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In the Supreme Court of the United States

OCTOBER TERM, 1982

DIXIE FINANCE COMPANY, INC., AND
TRANSOUTH FINANCIAL CORPORATION, PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), bars the Federal Trade Commission from enforcing compulsory process that was issued to certain consumer finance companies for the purpose of determining whether the companies are misrepresenting credit terms by statements that credit insurance is a condition affecting the availability of financing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-21a) is reported at 695 F.2d 926. The opinion of the district court (Pet. App. 1a-8a) is reported at 695 F.2d at 927 App. A. The letter rulings of the Federal Trade Commission (R. 43-44; Doc. 7: Exh. 10; Pet. App. 25a-37a)[1] are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on January 20, 1983. The petition for a writ of certiorari was filed on March 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R.", "Doc.", and "Exh." references are to the original record in the district court. "Doc." and "Exh." references are to documents that did not become a part of the consecutively-paginated record.

STATUTES INVOLVED

Pertinent portions of Sections 5, 6, and 20 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45, 46, 57b-1, are set forth at Pet. App. 53a-56a. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), is set forth at Pet. App. 53a-56a.

STATEMENT

The question in this case is whether Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and Section 5 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. (Supp. V) 46, prevent the Federal Trade Commission from compelling petitioners to comply with civil investigative demands ("CIDs") issued during the course of a Commission investigation into possible false and misleading representations made by petitioners to prospective borrowers concerning the terms and conditions of consumer loans.[2] On September 4, 1980, the Commission, invoking its authority under Section 6 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 46, issued a resolution authorizing the use of compulsory process in a nonpublic investigation (R. 7). The resolution stated that the purpose of the inquiry was to determine whether consumer finance companies, automobile dealerships and others had engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (R. 7). The unfair or deceptive acts or practices under investigation included, but were not limited to, false and misleading representations to prospective borrowers that credit

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[2]Section 2(b) of the McCarran-Ferguson Act exempts the "business of insurance" from the coverage of the federal antitrust laws and the Federal Trade Commission Act to the extent that insurance activities are regulated by state law. Section 5 of the FTC Improvements Act of 1980 amended Section 6 of the FTC Act, 15 U.S.C. (Supp. V) 46, by clarifying that the McCarran-Ferguson Act exemption applies to FTC fact-finding inquiries and public reports. See S.Rep. No. 96-500, 96th Cong., 1st Sess. 13-15 (1979).

insurance is a prerequisite to the extension of credit (*ibid.*). The United States Court of Appeals for the Fourth Circuit had previously sustained the Commission's adjudicatory holding that such misrepresentations are "unfair and deceptive" within the meaning of Section 5. *In re Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975), on reconsideration, 87 F.T.C. 379 (1976), aff'd per curiam, 553 F.2d 97 (4th Cir. 1977).[3] The Commission also sought to determine in this inquiry whether actions for civil penalties under Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B), would be in the public interest if unfair or deceptive practices had in fact occurred (R. 7).[4]

In November 1980, a synopsis and copies of the Commission's decision in the *Peacock Buick* case were mailed to approximately 50 consumer finance companies and automobile dealerships. The mailings served to ensure that the recipients would have "actual knowledge," for purposes of Section 5(m)(1)(B) of the FTC Act, that the conduct proscribed in *Peacock Buick* was "unfair and deceptive" within the meaning of Section 5. See n.4, *supra*. In April 1981, virtually identical civil investigative demands, a form of compulsory process authorized by Section 20 of the FTC Act, 15 U.S.C. (Supp. V) 57b-1, were issued to 43 of the companies (*e.g.*, R. 10-18). The CIDs sought information regarding oral representations the companies made to loan

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[3]The opinion of the court of appeals in *Peacock Buick* (App., *infra*, 1a-2a) is not officially published. It appears at 11 C.D. 199 (1977).

[4]Under Section 5(m)(1)(B) of the FTC Act, any person, partnership, or corporation that engages in acts or practices found to be "unfair or deceptive" by the Commission under Section 5 may be held liable for civil penalties in a suit brought by the United States if the person, partnership or corporation engaged in those practices with actual knowledge that they were unlawful.

applicants concerning credit terms — specifically, whether the companies had falsely represented to applicants that credit was conditioned on the purchase of otherwise optional credit insurance.[5]

Initially, twenty-two of the firms responded to the Commission's request for documents.[6] Petitioners (and some other CID recipients) petitioned the Commission to set aside the CIDs, arguing that the conduct under investigation was the "business of insurance," immunized from Commission inquiry under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and Section 6 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) 46 (R. 20-41; Doc. 7: Exh. 9).

The Commission denied petitioners' motions to set aside the civil investigative demands, but modified the demands to reduce the burden of compliance and to clarify certain of the demand specifications (R. 43-44; Doc. 7; Exh. 10). In a separate statement (Pet. App. 25a-37a), the Commission explained that misrepresentations concerning the optional status of credit insurance are part of the business of extending credit, not the business of insurance (*id.* at 32a-33a). The Commission relied on its prior decision in *Peacock Buick, supra,* which had been affirmed by the court of appeals despite Peacock's claims that the McCarran-Ferguson Act

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[5]Under Section 106 of the Truth in Lending Act, 15 U.S.C. 1605 and its implementing regulations, 46 Fed. Reg. 20894-20895 (1981), to be codified at 12 C.F.R. 226.4, a creditor who offers credit life insurance incident to the extension of credit must include the premiums for such insurance in the computation and disclosure of the annual percentage rate of the loan, unless credit insurance is not required by the creditor for the extension of credit, and the consumer has made a written election to accept such insurance, following written disclosure that it is optional.

[6]After review of the companies' returns, the investigation of 13 firms was closed.

protected false oral representations concerning the optional status of credit insurance. The Commission noted that this Court's ruling in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), supported its conclusion because "representations by car dealers and finance companies that the purchase of credit insurance is a prerequisite to the extension of credit * * * do[] not relate to risk spreading arrangements, nor do[ ] [they] concern the relationship between the insurer and the insured, which is the core of the 'business of insurance' " (Pet. App. 36a-37a).[7]

Petitioners declined to provide the documentary materials required by the modified CIDs (R. 64; Doc. 7: Exh. 12). On January 19, 1982, the Commission instituted enforcement proceedings in the United States District Court for the Eastern District of Louisiana.[8] The district court enforced the CIDs and issued a memorandum opinion sustaining the Commission's authority to investigate the

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[7]Because the Commission concluded that the conduct in question was not part of the "business of insurance," it did not consider the further question under the McCarran-Ferguson Act of whether the conduct was regulated by state law (Pet. App. 27a n.4). See 15 U.S.C. 1012(b).

[8]Proceedings for enforcement of the civil investigative demands issued to six other consumer finance companies are pending in the Eastern District of Pennsylvania. *FTC* v. *Manufacturers Hanover Consumer Services, Inc.*, Misc. No. 81-363 (E.D. Pa. filed Dec. 4, 1981). The remaining consumer finance companies and automobile dealerships have either complied with the Commission's information demands or are negotiating terms of compliance with the Commission's staff.

Some of the firms that initially refused to comply with the CIDs (and one firm that had not even received a CID) instituted preemptive actions for declaratory and injunctive relief after the Commission issued its letter rulings refusing to withdraw the CIDs. All the preemptive suits have been dismissed. *General Finance Corp.* v. *FTC*, 700 F.2d 366 (7th Cir. 1983); *Credithrift Financial, Inc.*, v. *FTC*, No. EV 81-206-C (S.D. Ind. Feb. 22, 1983) (by stipulation); *FTC* v. *Manufacturers Hanover Consumer Services, Inc.*, 543 F. Supp. 1071 (E.D. Pa. 1982); *Audubon Life Ins. Co.* v. *FTC*, 543 F. Supp. 1362 (M.D. La. 1982).

conduct found unlawful in *Peacock Buick, supra.* Emphasizing that the Commission's inquiry was limited to possible misrepresentations to prospective borrowers concerning the terms and conditions of consumer loans, the court concluded that: (a) the lending activities of a company are apart from any insurance activities in which it may engage (Pet. App. 6a); (b) a false or misleading representation to a prospective borrower that credit insurance is a prerequisite to the extension of credit is part of the credit relationship, not the relationship between insurer and insured (*id.* at 7a); (c) such a practice induces the purchase of credit (*id.* at 8a); and (d) the "business of insurance" intrudes upon the business of financing only at the point that the borrower or the lender seeks to deal with the insurer regarding the particulars of the policy being purchased (*id.* at 7a). The critical fact, the district court explained, is that the Commission's inquiry concerns "a precondition to the extension of credit" rather than the "actual sale" of an insurance policy (*id.* at 5a).

On appeal, the Fifth Circuit affirmed on the basis of the district court's opinion (Pet. App. 10a). The panel found "eminently correct" the district court's conclusion that the conduct under inquiry by the Commission related to the "arrangement of credit and not the 'business of insurance' " (*ibid.*). Judge Reavley, dissenting, rejected the distinction between misrepresentations concerning the terms of the consumer credit contract and misrepresentations concerning the terms of insurance policies sold incident to consumer loans (*id.* at 18a-21a).

ARGUMENT

The decision of the court of appeals is correct and is consistent with prior decisions of this Court and other courts of appeals. In particular, the decision below is in accord with the prior pronouncements of this Court that

limit the "business of insurance" to core insurance functions. The decision, moreover, properly accommodates the McCarran-Ferguson Act with longstanding federal regulatory interests in noninsurance markets.[9] Review by this Court is not warranted.

1. The decision of the court of appeals accords with that of the only other appellate court that has addressed the question whether the particular kind of credit practices under scrutiny in the current investigation are part of the "business of insurance." *Peacock Buick, Inc., supra.* In that case, the Commission's concern was that an automobile dealership and its employees were misrepresenting the terms of loans that they arranged for their customers. Although the loan documents prepared by the dealership indicated that area lenders did not require prospective borrowers to purchase credit life insurance in order to obtain financing, and a lower rate for the loan was quoted on that basis (see n.5, *supra*), the dealership customarily presented consumers with filled-in loan documents, ready for signature, that included charges for credit insurance without the prospective borrower's prior knowledge or approval. In some instances, consumers were told they would have difficulty obtaining, or could not obtain, financing without agreeing to accept credit life insurance (86 F.T.C. at 1558). The Commission entered a cease and desist order forbidding the dealership from misrepresenting the necessity of credit insurance (*id.* at 1566-1568).

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[9]Section 5 of the FTC Improvements Act of 1980, 15 U.S.C. (Supp. V) 46, did not broaden the restrictions of the McCarran-Ferguson Act. It simply confirms that the McCarran-Ferguson Act's exemption for the "business of insurance" extends to FTC fact-finding inquiries. The 1980 legislation did not affect the Commission's authority, as otherwise circumscribed by the McCarran-Ferguson Act, to conduct law enforcement investigations to determine whether persons or business entities are engaged in conduct prohibited by Section 5 of the FTC Act, 15 U.S.C. 45. S. Rep. No. 96-500, 96th Cong., 1st Sess. 13-15 (1979).

The dealership petitioned the Commission for reconsideration, arguing that the practices proscribed by the Commission's order were protected by the McCarran-Ferguson Act. The Commission denied the motion, concluding that the dealership's misrepresentations involved an "arrangement of credit," and that the congressional goal of noninterference with the "business of insurance" must be harmonized with the goal of federal prevention of deceptive credit practices (87 F.T.C. at 381-382). The Commission reasoned that the "business of insurance" intrudes upon the business of financing only at the point at which the borrower or his lender deal with an insurer regarding the particulars of the policy being purchased (*id.* at 382). On petition for review of the Commission's order, the Fourth Circuit sustained the Commission's authority to regulate (and thus investigate) the challenged conduct, declaring that the Commission "was not precluded by the McCarran-Ferguson Act * * * from prohibiting petitioners from misrepresenting to their customers that they must purchase credit life insurance as a prerequisite to obtaining consumer credit. Such a misrepresentation is clearly within the jurisdictional ambit of FTC" (*Peacock Buick, Inc.* v. *FTC, supra,* 11 C.D. at 200 (App., *infra,* 2a)).

2. The decision of the court of appeals in this case accords not only with *Peacock Buick, supra,* it also comes well within the criteria that this Court has established for identifying the "business of insurance" under the McCarran-Ferguson Act. *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra; Union Labor Life Ins. Co.* v. *Pireno,* No. 81-389 (June 28, 1982). The conduct being scrutinized by the Commission — false representations to prospective borrowers that credit insurance is a condition of the extension of consumer credit — does not transfer or spread risk, "one 'indispensable characteristic of insurance.' " *Union Labor Life Ins. Co.* v. *Pireno, supra,* slip

op. 7, quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* 440 U.S. at 211-212. The transfer of risk is accomplished by a subsequent, independent contractual arrangement — *i.e.*, the insurance policy itself. The conduct under Commission scrutiny, therefore, is both temporally and logically unconnected to the transfer of risk.

Nor does the inquiry touch on "an integral part of the policy relationship between the insurer and the insured" (*Union Labor Life Ins. Co.* v. *Pireno, supra,* slip op. 9; see also *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* 440 U.S. at 215-216)—*i.e.*, the type of policy that can be issued, its reliability, interpretation, or enforcement. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969). In making misrepresentations to prospective borrowers concerning the terms on which credit is available, consumer finance companies are acting as creditors, not as insurers. As the Commission explained in denying the petitions to quash the civil investigative demands (Pet. App. 28a-29a):

> Such representations by lending institutions and car vendors have no connection with the business of insuring the public against loss or with the actual terms of individual insurance policies. They have much to do, however, with the lender-borrower relationship and with the credit applicant's understanding of the conditions for and costs of receiving credit. Without accurate loan information, potential borrowers are precluded from fully comprehending the lender's terms of doing business and are foreclosed from effective comparison shopping opportunities.

The Commission's inquiry in this case, moreover, involves noninsurance entities and affects noninsurance markets (*Union Labor Life Ins. Co.* v. *Pireno, supra,* slip op. 8-9, 12-13; *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* 440 U.S. at 231). Misrepresentations of the necessity for credit insurance do not simply influence the sale of

insurance, rather they unfairly induce the sale of credit. See *Peacock Buick, Inc., supra,* 11 C.D. at 200 (App., *infra,* 2a). If credit insurance is in fact required as a prerequisite to the extension of credit, the premiums for such insurance must be included in the quoted annual percentage rate ("APR") for the loan. See n.5, *supra;* Amendments to Regulation Z, 46 Fed. Reg. 20894-20895 (1981) (to be codified at 12 C.F.R. 226.4(d)). Unscrupulous lenders have been known to quote an APR that excludes the cost of credit insurance and then to misrepresent the need to purchase such credit insurance once the credit contract is ready for signature and the prospective borrower is less likely to back out of the deal. See, *e.g., Peacock Buick, Inc., supra.* Whether such misrepresentations concern the need to purchase credit insurance or some other product, the effect is to impose hidden charges for the loan, to the detriment of credit consumers and honest competitors in the market for consumer credit.

When used to induce unfairly the sale of credit, misrepresentations that a loan requires credit insurance impinge on the Commission's longstanding responsibilities under Section 5 of the FTC Act for ensuring that noninsurance markets — here, the market for consumer credit — are fair and free of deception. See, *e.g., Peacock Buick, Inc., supra,* 11 C.D. at 200 (App., *infra,* 2a); *World Wide Television Corp.* v. *FTC,* 352 F.2d 303 (3d Cir. 1965), cert. denied, 384 U.S. 928 (1966); *Ford Motor Co.* v. *FTC,* 120 F.2d 175 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *General Motors Corp.* v. *FTC,* 114 F.2d 33 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941). As the Commission explained in *Peacock Buick, Inc., supra,* 87 F.T.C. at 381, its regulatory responsibilities are embodied not only in the Federal Trade Commission Act's proscription of "unfair or deceptive" acts or practices, but also in the explicit requirements of Section 106 of the Truth in Lending Act, 15 U.S.C. 1605, and its

implementing regulations. See n.5, *supra;* amendments to Regulation Z, *supra,* to be codified at 12 C.F.R. 226.4(d).

3. By carefully defining the scope of the "business of insurance," this Court has recognized that the McCarran-Ferguson Act's exemption must be narrowly construed to accommodate valid federal regulatory interests in noninsurance markets. *Union Labor Life Ins. Co.* v. *Pireno, supra; Group Life & Health Ins. Co.* v. *Royal Drug Co., supra.* The fact that a particular regulatory matter impinges in some tangential fashion upon the interests of an insurance company has never been sufficient to oust valid federal regulatory authority.

In *SEC* v. *National Securities, Inc., supra,* the Securities and Exchange Commission sought to dissolve a merger, notwithstanding its approval by the state insurance director, because of misrepresentations that had been made in shareholder communications. The Court rejected the argument that any attempt to interfere with the merger would "invalidate, impair, or supersede" state insurance laws (393 U.S. at 463). Emphasizing that the merger was at least as important to those owning the companies' stock as it was to those holding their policies, this Court concluded that there was "no reason to emasculate the securities laws by forbidding remedies which might prove to be essential" (*ibid.*).

Following *National Securities,* the courts of appeals have similarly sought to reconcile potentially conflicting federal and state regulatory interests. In *Cochran* v. *Paco, Inc.,* 606 F.2d 460, 467 (1979), quoting *SEC* v. *Republican National Life Ins. Co.,* 378 F. Supp. 430, 436 (S.D.N.Y. 1974), the Fifth Circuit declared that "[t]he McCarran Act is to be 'narrowly construed in the face of valid federal regulatory interests.' " In *Cochran* and its two companion cases, *Perry* v. *Fidelity Union Life Ins. Co.,* 606 F.2d 468 (1979), cert. denied, 446 U.S. 987 (1980), and *Cody* v. *Community Loan Corp.,* 606 F.2d 499 (1979), cert. denied,

446 U.S. 988 (1980), the Fifth Circuit accommodated the McCarran-Ferguson Act with the federal regulatory interests reflected in the Truth in Lending Act by concluding that the McCarran-Ferguson Act did not preclude requiring full disclosure in consumer credit transactions. The court rejected assertions, similar to those made by petitioners, that the disputed insurance premium financing and credit sale arrangements facilitated the sale of insurance and were therefore part of the "business of insurance."

Likewise, in *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), the District of Columbia Circuit accommodated the McCarran-Ferguson Act with the federal regulatory interests in the business of banking that are reflected in the Comptroller of the Currency's broad statutory authority to curb "unsafe or unsound" banking practices — powers that the court analogized to the FTC's mandate with respect to "unfair or deceptive practices." The court sustained the Comptroller's authority to issue regulations prohibiting national bank insiders from receiving commissions from the sale of credit insurance, despite objections that such arrangements were protected by the McCarran-Ferguson Act. In rejecting the claimed exemption, the court specifically recognized (613 F.2d at 1168) that the conduct proscribed by the disputed regulation may stimulate overselling of credit insurance to potentially uninterested borrowers.

The decision of the court of appeals in this case accords fully with the decisions of this Court and the courts of appeals summarized above. The decisions in *Addrisi* v. *Equitable Life Assurance Soc'y of the United States*, 503 F.2d 725 (9th Cir. 1974), cert. denied, 420 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233 (2d Cir. 1975), moreover, are not sound authority to the contrary.

As petitioners acknowledge (Pet. 14), *Addrisi* and *Dexter* were decided before this Court's decisons in *Royal Drug* and *Pireno*. The courts below correctly observed that *Dexter* and *Addrisi* "have lost their viability and are distinguishable" in light of the recent decisions of this Court that reject petitioners' expansive reading of the McCarran-Ferguson Act exemption (Pet. App. 7a, 17a).[10]

The *Addrisi* and *Dexter* courts, moreover, did not view the complaints in those cases as involving federal regulatory interests in a noninsurance market. The cases involved an insurance company's practice of tying life insurance to residential mortgages. The *Dexter* court construed the complaint before it as alleging the use of a tying arrangement solely to coerce the sale of insurance, thereby expanding an *insurer's* share of the *insurance* market (527 F.2d at 236; see also *Addrisi, supra*, 503 F.2d 727). Thus, the court did not address the entirely different concern of the Commission in this investigation — that misrepresentations regarding the necessity for credit insurance might be used to mislead

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[10]Indeed, the Ninth Circuit has cast doubt on its own prior holding in *Addrisi*. In *Portland Retail Druggists Ass'n* v. *Kaiser Foundation Health Plan*, 662 F.2d 641 (1981), that court vacated a district court order granting summary judgment to a group of health insurers that had tied health care services to the purchase of pharmaceuticals from the insurers' pharmacies. The district court found that the arrangement was protected by the McCarran-Ferguson Act. The court of appeals, however, instead of simply affirming on the basis of *Addrisi*, remanded the case to the district court with instructions to determine whether the challenged tying arrangement reflected the " 'indispensable characteristic of insurance' — the 'spreading of risk,' recognized in *Royal Drug* as essential * * * for application of the McCarran-Ferguson defense" (662 F.2d at 647, quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, 440 U.S. at 212). More recently, in *Hahn* v. *Oregon Physicians Service*, 689 F.2d 840, 843 n.2 (9th Cir. 1982), the court cautioned: "[c]ourts should be careful not to allow insurance companies to broaden the antitrust exemption by simply diversifying into areas not traditionally considered to be the business of insurance."

consumers about the cost and terms of *credit* obligations that they might not otherwise undertake. This inquiry into the functioning of a noninsurance market "is clearly within the jurisdictional ambit of FTC." *Peacock Buick, Inc.* v. *FTC, supra,* 11 C.D. at 200 (App., *infra,* 2a).[11]

5. For the reasons stated above, there is no inconsistency between the decision of the court of appeals and this Court's per curiam decision in *National Casualty Co.* v. *FTC,* 357 U.S. 560 (1958). Misrepresentations concerning the optional status of insurance in connection with an extension of credit, when used to induce deceptively the sale of that credit, impinge on the Commission's longstanding regulatory interests in a noninsurance market — here, the market for consumer credit. This factor was not present in *National Casualty.* The misrepresentations challenged by the Commission in that case concerned the actual terms, benefits, and limitations of individual policies of insurance; the Commission's regulatory responsibilities in a noninsurance market were not involved.

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[11]The rationale of *Addrisi* and *Dexter* has been criticized by virtually every commentator who has examined those cases. See Nedrow, *The McCarran Controversy: Insurance and the Antitrust Law,* 12 Conn. L. Rev. 205, 220 (1980); Comment, *The McCarran Act's Antitrust Exemption for The "Business of Insurance": A Shrinking Umbrella,* 43 Tenn. L. Rev. 329, 351-356 (1976); Note, *The Definition of "Business of Insurance" under the McCarran-Ferguson Act after* Royal Drug, 80 Colum. L. Rev. 1475, 1490 & n.97 (1980).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1983-04

APPENDIX

PEACOCK BUICK, INC., et al. v. FEDERAL TRADE COMMISSION*

No. 76-1287. F.T.C. Dkt. 8976

(United States Court of Appeals, Fourth Circuit, April 1, 1977)

Before WINTER, BUTZNER and HALL, *Circuit Judges.*

PER CURIAM:

Peacock Buick, Inc., a corporation, and Dr. Norman Bernstein and Michael B. Peacock (Dr. Bernstein's son), the owners and officers of Peacock Buick, petition us to review and set aside an order of the Federal Trade Commission (FTC). FTC found that Peacock Buick had violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) and (6), by virtue of certain unfair and deceptive practices in the sale of used cars, and it ordered petitioners to cease and desist from those and related practices. We think that the Commission's order is valid and should be allowed to stand.

Petitioners advance numerous reasons why the order should be set aside, but we find that none of them has merit. The order of FTC properly prohibited unfair labor practices dealing with advertisements and new car sales. It is true that the proof did not establish that petitioners had engaged in such misconduct, but there was abundant proof that Peacock Buick had engaged in deceptive practices with regard to the sale of used cars. It is clear that FTC orders are not limited to the precise form of unlawful conduct found to have been practiced. FTC orders may extend to reasonably

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* Not otherwise reported; aff'd 553 F.2d 97 (1977). For case before the Commission, see 86 F.T.C. 1532.

related practices found to be unfair or deceptive. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946). FTC must be allowed "effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

FTC did not err by including Messrs. Bernstein and Peacock individually within the scope of its order. Substantial evidence suggests that Peacock Buick is a family corporation under the direct supervision and control of Bernstein and Peacock. If the order were directed solely to Peacock Buick, Bernstein and Peacock could evade its terms by dissolving Peacock Buick and transferring its operation to themselves as individuals, or as a partnership, or to another entity. In that event, FTC would be forced to implement its decree by the cumbersome route of an independent civil action. 15 U.S.C. § 45(m)(1)(B).

Finally, FTC was not precluded, by the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, from prohibiting petitioners from misrepresenting to their customers that they must purchase credit life insurance as a prerequisite to obtaining consumer credit. Such a misrepresentation is clearly within the jurisdictional ambit of FTC. Petitioners were not engaged in "the business of insurance," insofar as that business contemplates the relationship between insurer and insured. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

PETITION TO SET ASIDE DENIED.